

**IN THE COURT OF APPEAL, FIJI**  
**On Appeal from the High Court of Fiji at Suva**

**CRIMINAL APPEAL AAU 0057 OF 2016**  
**[Suva High Court No: HAC 145 of 2014]**

**BETWEEN** : **ERONI QIO**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Mataitoga, P**  
**Qetaki, RJA**  
**Rajasinghe, JA**

**Counsel** : **Mr Cati for the Appellant**  
**Mr Kumar, R for \_Respondent**

**Date of Hearing** : **6 May, 2025**

**Date of Judgment** : **29 May, 2025**

**JUDGMENT**

[1] The appellant [Eroni Qio] had been charged in the High Court of Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed on 11 March 2014 at Mulomulo Place, Nakasi in the Central Division.

- [2] The Information read as follows:

**'Statement of Offence**

**AGGRAVATED ROBBERY:** *Contrary to section 3) (a) o(a) of the Crimes Decree No. 44 of 2009.*

**Particulars of Offence**

ERONI QIO with others, on the 11<sup>th</sup> day March 2014 at Mulomulo Place, Nakasi in the Central Division, stole cash in the sum of \$4,110.00, 1 Ripcurl bag valued at \$105.00, 1 pair of canvas shoes valued at \$100.00, 5 x 22 carat gold chain valued at \$3,000.00, 3 pairs of gold earrings valued at \$2,000.00, 1 x bracelet valued at \$2,000.00, 10 x gold rings valued at \$3,000.00, all to the total value of \$14,315.00 from Nisha Shar and immediately before stealing used force on the said NISHA SHAH.

- [3] After trial, on 13 May 2016 the assessors unanimously found the appellant guilty of aggravated robbery as charged. The trial judge accepted the assessor's verdict and convicted the appellant as charged and sentenced him to 16 years imprisonment with a non-parole period of 15 years.
- [4] The appellant being dissatisfied with the conviction had in person signed a **timely appeal against conviction** on 20 May 2016 (received by the CA registry on the same day). Thereafter, the appellant had filed several amended grounds of appeal and submissions from time to time. However, at the Leave Appeal Hearing the appellant informed the court that he would rely on the grounds of appeal numbered from (a) to (f) and submissions contained in his hand written document signed on 16 October 2017 and received by the Maximum Correction Centre and the CA registry on 23 October 2017 and 27 October 2017 respectively. The respondent's written submissions in reply to the same had been filed on 10 June 2020.

**Leave to Appeal Grounds**

- [5] The grounds of appeal advanced by the Appellant at the Leave Hearing before the Single Judge were as follows:
- i) Ground A – complain that certain pretrial events tainted proceedings in the High Court. The appellant argued that his unlawful detention beyond 48 hours without being brought before a court of law was a

violation of his section 13 (1)(f) of the Constitution. Second, his claim that he was not given liberty to communicate with a lawyer.

- ii) Grounds B & C – related to identification evidence in which the appellant claim that the poor quality of Nisha Shah’s evidence and should have been rejected as it led to miscarriage of justice
- iii) Ground D – the argument here for the appellant was that paragraph 12 and 13 of trial Judge’s summing-up relating to the particular of the offence with the word Eroni Qio “*with others*” was wrong and therefore invalidate the charge. This is a frivolous argument.
- iv) Ground E – the appellant’s complained here is that the trial judge did not address the assessors about the inconsistency in the evidence of crucial witness PW2, that she did not mention accurately about his deformed finger and shaved head in her police statement.
- v) Ground F - the appellant claim that trial judge did not independently assess and evaluate the evidence against him in his judgement. This argument confuses the requirement to give cogent reasons by a trial judge when he disagrees with majority decision of the assessors at a trial, which is not the case here.

[6] Each of the above grounds of appeal were carefully considered by the Judge Alone at the leave hearing. At the conclusion of the Leave to Appeal hearing, the Ruling was delivered on 31 July 2020, wherein leave to appeal was refused for all the grounds urged by the appellant. The Single Judge deferred the issue of the omissions in the evidence of PW2 with refence to the appellant ‘shaved head’ in his police statement and evidence at the trial to the full court hearing.

#### **Application to Adduce Fresh Evidence**

[7] On 28 February 2024 filed a Notice of Motion to Adduce Fresh Evidence and an affidavit sworn by Timoci Kunadei, who was PW3 at the trial of this matter in the High Court. Counsel for the appellant submitted an application to adduce fresh evidence which was a recanting affidavit statement by PW3 Timoci Kunadei saying that what he said in court at the trial was:

- not the absolute truth;
- he said what he said because he hated the appellant incorrect;
- what he saw on that particular morning not true reflection;

- High possibility that the person he identified is not the appellant
- He now know what he did was wrong and unfair; and
- He has sought forgiveness from the appellant's family and reconciled.

[8] The court noted that the evidence to be adduced is not fresh evidence but evidence that PW3 has changed his position with the issue of identification of the appellant. It has taken 9 years for this fresh evidence to surface in circumstances not clearly explained in court.

[9] In **Reddy v State [2024] FJCA 38**, the Court of Appeal stated:

*“[16] This Court may accept fresh evidence if it thinks it necessary or expedient in the interests of justice: section 28 Court of Appeal Act. It is well settled that an applicant for leave to adduce fresh evidence on appeal must satisfy the appellate court that the evidence sought to be admitted is “fresh” (that is, could not with reasonable diligence have been obtained before the trial), is cogent (that is, could have had a substantial influence on the outcome of the trial), and is apparently credible.”*

[10] The nature of the evidence covered in the fresh evidence application is not fresh in that it was available at the time of the trial. The fresh evidence is not credible in that what PW3 said about the deformed finger of the appellant is also the testimony of PW2. That physical characteristic of the appellant which was also confirmed by the identification evidence of PW2 shows that the appellant was properly identified and convicted. The fresh evidence application is therefore rejected.

### **Renewed Appeal under Section 35(3) Court of Appeal Act 2009**

[11] By a Notice dated 12 August 2020, filed by the appellant there were 3 grounds of renewed appeal against conviction submitted for the Court to consider. These are:

- i) The learned trial judge had failed to take into consideration the weakness of a photographic identification produced by PW2 Nisha Shah;

- ii) The learned trial judge failed to take into consideration the speculation guesswork in the circumstantial evidence produced by PW3 Timoci Kunadei;
- iii) The learned trial judge erred in law in not adequately directing/misdirecting himself to the significance of prosecution witnesses conflicting evidence

[12] On 20 July 2021, the appellant filed Notice of Amended Supporting Submissions for the grounds of appeal dated 12 August 2020. It should be noted that despite the clear rejection of these grounds of appeal at the Leave Hearing no new submissions were advance to address the findings of the Single Judge Ruling dated 30 July 2020. The court will now review each of the renewed appeal grounds.

**Inadequate Directions to the Assessors on the weakness of the photographic identification evidence by PW2 Nisha Shah [Ground1]**

[13] This ground of appeal failed to specify clearly what is the weakness of the photographic evidence, for which trial judge erred when giving directions to the assessors. To fully put into context the appellants claim, it should be with regard to the actual summing-up directions given by the trial judge at paragraphs 28 to 33. It will be noted that paragraphs 31 to 33 stated as follows:

31. *"In assessing the quality of PW2's identification evidence against the accused, I must direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one identification of the accused which the defence may alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness may be mistaken. Second, you must carefully examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Was there any special reason for remembering the accused's' faces? Was a police identification parade done? Third, are there any specific weakness in the identification made. The answers to the above questions will determine the quality of the identification evidence. If the quality is good, you may rely on the identification evidence. If its otherwise, you may reject it.*

32. In this case, PW2 said she saw the accused's face for 20 to 25 seconds. PW2 said, she was standing one foot away from him. PW2 said, the 2 feet tube light in the porch was turned on, so was the two 2 feet tube lights in the adjoining sitting room. So, it would appear there was enough light in the area to show both accused and PW2's face. PW2 said, her observation of the accused's face was not impeded. PW2 said, this was the first time she saw the accused. PW2 said, a special reason for remembering his face was what he did to her that night and when they struggled against each other near her mum's room and she noticing his deformed left fingers. PW2 said, no police identification parade was done in this case.
33. Are there any special weakness in PW2's identification evidence? It was unfortunate that a police identification parade was not held. This would certainly test the veracity of PW2's identification evidence. However, you must take note that the accused refused a police identification parade and also consider his reasons for not doing so. PW2 identified the accused first when the police showed her a number of photographs, and later she identified him in the dock during trial, as one of the persons who came to her house on 11 March 2014. On PW2 identifying the accused through photographs given by police, I must direct you not to look at it in a negative light. The police keep photographs for various reason, and most of it for positive and good reasons. As the accused is presumed innocent until proven guilty beyond reasonable doubt, do not make any negative inferences against the accused as a result of the photos the police showed PW2. If, after considering the above, you think PW2's identification of the accused was good and of a high quality, you may use it to connect the accused to the crime. If otherwise, you will have to work on the other evidence to connect the accused to the crime. It is a matter entirely for you: *State v Eroni Qio* [2016] FJHC 487(HAC 145 of 2014).

[14] The trial Judge's summing up did not avoid the weakness in PW2 Nisha Shah's identification evidence, he directly addressed it and correctly explained why the photos showed by the police to PW2 were standard police investigation procedure. It is clear that directions given to the assessors were clear and adequate and the Turnbull direction were fully given. Even the claimed weaknesses in PW2 evidence were considered and addressed by the trial judge in his directions. This ground of appeal has no merit and is dismissed.

**Trial Judge failed to consider the speculation and guesswork in the evidence of PW3 Timoci Kunadei [Ground 2]**

[15] The appellant was also identified by PW3 Kunadei, a Corrections Officer and in the trial judge's summing up to the assessors he summarised PW3's evidence as:

34. *Timoci Kunacei (PW3) said on 11 March 2014, he lived at Lot 1 Vishnu Deo Road, Nakasi, and had worked for Suva Correction Centre for 16 years. PW3 said, on 11 March 2014 at 4.30 am, he was waiting at Bhawani Dayal Secondary School bus stop, with other fellow workers, to go to work. PW3 said Bhawani Dayal Secondary School shared the same compound with Bhawani Dayal Primary School. PW3 said, he heard footsteps behind the bus stop. He looked and saw 4 men in black clothing's. PW3 said, he recognized one of them as the accused. He was 5 footsteps away. There was a street light eight footsteps away and it lighted the area. There were other nearby streets lights on the road. PW3 said, he observed the accused's face for 3 minutes. There was a slight obstruction from a small tree, but the wind bends the same and he saw the accused. PW3 said he called out his name, and he and his mates walked away. PW3 said he recognized the accused with his shaved head and his deformed left fingers. PW3 said, he had seen the accused numerous times before on work related matters. PW3 said, the last time he saw him was in February 2014. PW3 said, he had known the accused for 12 years.*
35. *PW3 said, he and his fellow workers followed the accused and his friends. They went towards Gulam Mohammed Hardware Shop at Nakasi. PW3 said, he saw the accused and his friends cross the road and fled into the Nasinu Cemetery. Near the Hardware shop, PW3 said he found 2 pinch bars and a cane knife wrapped in a plastic jacket left behind by the accused and his friends. He later took the same to Nakasi Police Station.*
36. *When assessing the quality of PW3's identification of the accused on 11 March 2014 after 4.30 am, please take on board the directions I gave you in paragraph 31 hereof. PW3 said, he observed the accused's face for 3 minutes. PW3 said, the accused was 5 footsteps away from him. PW3 said, a street light was 8 footsteps away from the accused and it lighted the area. There were other street lights along the road. PW3 said, a small tree partly impeded his view, but when it moved because of the wind, he saw the accused's face clearly. PW3 said, he knew the accused well and had known him for the previous 12 years. PW3 said, a special reason for remembering his face was because of his shaved head and his deformed left fingers, which he saw that night. No police identification was done. However, in cases of recognition, it was often said that a police identification parade was often prejudicial to the accused because the witness already knew and would pick him out in a parade.*
37. *Are there any specific weaknesses in PW3's identification of the accused? There appeared to be none, but it must be noted that this was an alleged identification of the accused near a bus stop near the crime scene. It was not an identification at the crime scene, that is, at the Shah's family house. In any event, if you think*

*the quality of PW3's identification of the accused was good, you may accept it. If you think otherwise, you may reject it. It is a matter entirely for you.*

38. *If you accept PW3's identifying the accused at the bus stop on 11 March 2014 after 4.30 am, it could possibly be used as circumstantial evidence against the accused. Circumstantial evidence means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. The Shah's family had been violently robbed by 4 masked men at Lot 25 Mulomulo Road, Nakasi, on 11 March 2014 at about 4am. According to PW1 and PW2, pinch bars and cane knives were used in the robbery. PW2 said, she identified the accused as one of the men who violently robbed them that morning. PW2 said, she saw the man with deformed left fingers. PW3 knew the accused had deformed left fingers and saw the same on the accused on 11 March 2014 after 4.30 am. The accused in court showed everyone that his left fingers were deformed. The bus stop, where PW3 identified the accused, was near to Mulomulo Road where the Shah family lived. PW3, at the time, lived at Vishnu Deo Road, which was near Shah family's residence. Mulomulo Road is also near the Gulam Mohammed Hardware Shop at Nakasi. PW3 found 2 pinch bars and a cane knife wrapped with a jacket, which allegedly was abandoned by the accused and his friends when they fled to the Nasinu Cemetery.*
39. *You must examine the above evidence with care. Does the evidence lead you to the sure conclusion that the accused committed the offence? Or does it lead you the sure conclusion that the accused did not commit the crime. If you think the above evidence led you to the sure conclusion that the accused committed the crime, you may use the same against him. If its otherwise, you may reject the evidence. It is a matter entirely for you.*"

[16] PW3 Timoci Kunadei's evidence is not guesswork and/or speculative as it related to the identification of the appellant. It was based on what he saw on the early morning of 11 March 2014, when he saw the appellant and the detail circumstances in which he saw him. The appellant's claim now advanced in this hearing was not put to this witness in cross-examination during the trial, when he was cross-examined by his counsel. It will be noted from paragraph 36, 37 and 38 of the summing up, the directions given by the trial judge to the assessors were correct. In both cases the directions given were clear and precise in its coverage of the evidence. This ground



of appeal was not pursued by counsel of the appellant after the application for fresh evidence was rejected.

- [17] In comparison the evidence of alibi by DW2 Aminiasi Lealeacagi which was clearly tailored to support the appellant's claim is suspect. DW2 admitted that he returned to the court room against the advice of the police to stay out of the court room until he was called. He did not do that and came back into the court room and heard the appellant's DW1 evidence and when he gave evidence, he tailored it to suit the appellant's evidence. The assessors were unanimous in their verdict that the appellant was guilty as charged. This was a conclusion that was open to them to find given the evidence they heard at the trial.

**Misdirection on the conflicting evidence of the prosecution witness – [Ground3]**

- [18] The appellant submits that the trial judge had not addressed the assessors regarding the inconsistency in the evidence of crucial witness PW2 Nisha Shah in that she had not mentioned or stated accurately about the deformed finger and shaved head of the appellant in her police statement. The deformed finger was mention in PW2 statement to the police and also in her evidence at the trial. However, she did not give evidence that the appellant had a shaved head, nor is that recorded in her police statement. In the leave to appeal ruling this matter was noted by the Judge Alone in this way:

*“[28] The appellant’s complaint is that the trial judge had not addressed the assessors about inconsistency in the evidence of crucial witness PW2 namely that she had not mentioned or not stated accurately about his deformed finger and shaved head in her police statement. It does not appear that she had said anything about the shaved head even at the trial. The appellant had demonstrated that he in fact had a deformed finger/s on his left hand at the trial.*

*[29] I cannot verify this compliant without the complete appeal record as the summing-up or the judgment makes no reference to such an inconsistency or omission. PW3 had confirmed the appellant’s shaved head and deformed left fingers when he saw him in wee hours of the morning on 11 March 2014. Eroni Qio v State [2020] FJCA 119.”*

[19] Having reviewed the court record for this full court hearing, it is clear that PW2 Nisha Shah's evidence, both in her police statement (page 207 copy record) and evidence in chief at the trial at page 249 mentioned only the deformed finger but not the shaved head. There is no inconsistency but an omission in PW2 Nisha Shah's evidence as regards the no mention of the shaved head of the appellant. On the other hand, PW3 Timoci Kunadei stated in his evidence in court that the appellant had a deformed finger and that he had his hair shaved: see: **CR Page 252**. There is no conflict in the evidence, just that PW2 Nisha Shah did not mention the shaved head of the appellant in his police statement and in her court evidence. But both PW2 and PW3 gave evidence of the deformed finger of the appellant. PW3 Kunadei recognized the appellant from his previous work experience.

[20] This evidence is in the context of the identification of the appellant and the issue for the court is whether PW2 Nisha Shah's omission was so significant that it would have caused miscarriage of justice. The guidelines to be followed is set out in **Nadim v State [2015] FJCA 130; AAU0080.2011 (2 October 2015)** where the Court of Appeal held as follows:

*“[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see R. v O'Neill [1969] Crim.. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance,... “Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ..... (3) The powers of observation differ from person to person. What one may notice, another may not. .... It is unrealistic to expect a witness to be a human tape recorder;” (see Bharwada Bhoginbhrjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280).”*

[21] This is one of those factors where all the important probabilities factors governing identification evidence of the appellant certainly support the case of the prosecution.

The trial judge accepted the assessor's unanimous verdict of guilty and in stated that he believed the evidence of PW2 Nisha Shah and PW3 Timoci Kunadei.

- [22] Then in general, the trial judge had directed assessors on the evidence of PW2 and PW3 with regard to their evidence relating to the culpability of the appellant in the crime.

39. *"You must examine the above evidence with care. Does the evidence lead you to the sure conclusion that the accused committed the offence? Or does it lead you to the sure conclusion that the accused did not commit the crime. If you think the above evidence led you to the sure conclusion that the accused committed the crime, you may use the same against him. If its otherwise, you may reject the evidence. It is a matter entirely for you."*

- [23] The learned trial judge had also addressed the appellant's defence of *alibi* since, if believed, it had the effect of negating the evidence of PW2 and PW3 on his identity at the scene of the crime.

*"41. On oath, the accused gave an alibi defence. He said, on 10 March 2014, he was at his home at Lot 3 Lagakali Road, Kalabu Housing. At 10.30 pm, he said, a friend of his, Aminiasi Lealeacagi (DW2) came to his home, and invited him to a grog party. They then left his home to go to DW2's house at Lot 10 Jale Street, Kalabu Housing. The accused said, they drank grog until the morning. He said, they never left the house. After the grog session, he returned home when it was daylight. In questions and answers 11 to 24 of Defence Exhibit No. 1(B), the accused repeated the above version to the police. The only variation is question and answer 22 where he said he slept over at DW2's home. DW2 also gave evidence for the accused, and confirmed the above version of events.*

42. *If you find the accused and DW2 as credible witnesses, and you accept their evidence, you will have to find the accused not guilty as charged. If you reject the accused's alibi defence, you will still have to look at the prosecution's whole evidence to find out whether or not they had made you sure of the accused's guilt. The burden to prove the accused's guilt beyond a reasonable doubt is still on the prosecution, even if you reject the accused's alibi defence. The defence is entitled to put in their alibi defence, but that does not mean the burden of proof had shifted to them. It never shifts to them. It is always on the prosecution from the start to the end of the trial."*

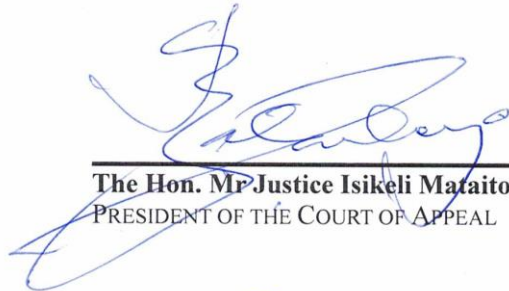
[24] The trial judge in agreeing with the assessors had stated in the judgment that he accepted the identification evidence of PW2 and PW3. This conclusion was reasonable, in taking into account the totality of the evidence in the trial.


[25] After a careful review of grounds of appeal submitted by counsel for the appellant the court is of the view that the appeal against conviction has no merit and is dismissed.

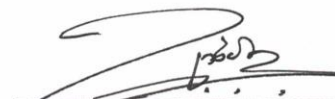
**ORDERS:**

1. Application for Adducing Fresh Evidence by appellant refused;
2. The appellant's appeal against conviction is refused



  
**The Hon. Mr Justice Isikeli Maitoga**  
PRESIDENT OF THE COURT OF APPEAL

  
**The Hon. Mr Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

  
**The Hon. Mr Justice Thushara Rajasinghe**  
JUSTICE OF APPEAL